SUPREME COURT, U. S.

APR 29 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 1373

PROBRO, INC., dba Lakewood Club,

Petitioner,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

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SUBJECT INDEX

Page

Opinion Below 1

Jurisdiction 1

Statement of Questions Presented 2

Statutory Provisions Involved 3

Statement of the Case 4

Reasons Relied on for Allowance of Writ 9

I.

The Department of Alcoholic Beverage Control of the State of California Has Acted Arbitrarily to Deprive Petitioner of His Right to Operate a Liquor Establishment for Which It Has Been Licensed Without Due Process of Law 9

II.

The Department of Alcoholic Beverage Control of the State of California Is Denying Petitioner Equal Protection Under the Laws by Proceeding With This Suspension When Other Cases in the State of California Have Found the Employment of "Topless" Waitresses Not to Be Contrary to Public Welfare and Morals .. 12

III.

The Department of Alcoholic Beverage Control of the State of California Has Acted as a Censor in That Itself Alone Has Determined the Employment of "Topless" Waitresses Is Wrong and Is Grounds for Penalty 13

Conclusion 14

INDEX TO APPENDICES

	Page
Appendix A. Proposed Decision	1
Appendix B. Certificate of Decision	5
Appendix C. Opinion of the Alcoholic Beverage Control Appeals Board	7
Appendix D. Decision of the Court of Appeal, Los Angeles, California, January 2, 1968	18
Appendix E. Decision of the California Supreme Court	19
Appendix F. Decision of the Court of Appeal. Los Angeles, California, February 26, 1968	20
Appendix G. Order	21
Appendix H. Findings of Fact and Conclusions of Law	22
Appendix I. Judgment	24

TABLE OF AUTHORITIES CITED

Cases	Page
American Communication Association v. Douds, 339 U.S. 382	11
Baggett v. Bullitt, 377 U.S. 360	11
Boreta Enterprises, Inc. dba Off Broadway v. the Department of Alcoholic Beverage Control of the State of California, San Francisco Superior Court Case No. 570 652 (1967)	3, 12
Cantwell v. Connecticut, 310 U.S. 296	12
Colbert v. New York, 87 S. Ct. 2092	11
Freedman v. Maryland, 380 U.S. 51	14
Giaccio v. Pennsylvania, 382 U.S. 399	11
Herndon v. Lowery, 301 U.S. 242	12
Katner v. California, 87 S. Ct. 2090	11
Manual Enterprises, Inc. v. Day, 370 U.S. 478	11
Mounce v. U.S., 355 U.S. 180	11
Probro, Inc. v. Department of Alcoholic Beverage Control of the State of California, Los Angeles Superior Court Case No. 920 751 (1968)	3, 12, 13
Schackman v. California, 87 S. Ct. 2107	11
Smith v. California, 361 U.S. 147	12
Sunshine Book Co. v. Summerfield, 355 U.S. 372	11
Superior Films, Inc. v. Department of Education, 346 U.S. 587	14
Winters v. New York, 333 U.S. 507	12

Page

California Business and Professions Code, Sec. 24200 4

California Business and Professions Code, Sec. 24200(a) 2, 5, 10

California Constitution, Art. XX, Sec. 22 ..... 2, 3, 5, 10

California Government Code, Sec. 11517 5

United States Code, Title 28, Sec. 1257(3) 1

United States Constitution, First Amendment 11

United States Constitution, Fourteenth Amendment 2

United States Constitution, Twenty-First Amendment 13

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vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

Probro, Inc., a corporation, respectfully prays that a Writ of Certiorari be issued to review the final judgment of the Supreme Court of California entered in the above matter on January 31, 1968.

Opinion Below.

The Decision of the California Court of Appeal, Second District, Division I, is printed as Appendix D hereto.

Jurisdiction.

The order of the California Supreme Court denying petition for Hearing was entered on January 31, 1968. The jurisdiction of this court is invoked under 28 U.S.C. 1257(3).

Statement of Questions Presented.

Is the California Constitution, Article XX, Section 22 and California Business and Professions Code, Section 24200(a) unconstitutional and violative of the due process clause of the Fourteenth Amendment of the United States Constitution because they are vague and uncertain in that (a) they do not give the liquor licensee any notice of the kind of conduct that is or is not contrary to public welfare and morals; and (b) the standard under the Constitution and the statute is ever varying and changing with fluctuations of moral sentiments?

Is the Department of Alcoholic Beverage Control of the State of California, an administrative agency, violating the due process clause of the Fourteenth Amendment to the United States Constitution when it acts to suspend the liquor license of a licensee when it has promulgated no standards, rules or regulations to apprise and give notice to the liquor licensee that the conduct for which the licensee has been accused is conduct violative of state law, but rather the Department has relied solely for its action upon the standard that the conduct is "contrary to public welfare and morals"?

Is the Department of Alcoholic Beverage Control of the State of California violating the due process clause of the Fourteenth Amendment to the United States Constitution when it acts to suspend the liquor license of a licensee by determining for itself that the conduct

is subject to disciplinary action in that such conduct is contrary to public welfare and morals without any evidentiary showing to the trier of fact, how, why, or in what manner, the conduct complained of is contrary to public welfare and morals?

Is the Department of Alcoholic Beverage Control of the State of California denying Petitioner equal protection under the law in suspending the liquor license of a licensee for conduct alleged to be subject to disciplinary action by the Department when that same conduct has been held in cases in the state courts of California[1] to be non-violative of state law?

Has the Department of Alcoholic Beverage Control of the State of California acted as a censor in that it has assumed that it has knowledge and expertise to determine whether or not the conduct complained of is to be prohibited?

Statutory Provisions Involved.

Article XX, Section 22, California Constitution,

> "The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the

[1] *Boreta Enterprises, Inc. dba Off Broadway v. the Department of Alcoholic Beverage Control of the State of California,* San Francisco Superior Court Case No. 570 652 (1967); *Probro, Inc. v. Department of Alcoholic Beverage Control of the State of California,* Los Angeles Superior Court Case No. 920 751 (1968).

power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude. It shall be unlawful for any person other than a licensee of said department to manufacture, import or sell alcoholic beverages in this State."

Section 24200, Business and Professions Code,

"Grounds. The following are the grounds which constitute a basis for the suspension or the revocation of licenses:

(a) When the continuance of a license would be contrary to public welfare or morals; but proceedings under this section upon this ground are not a limitation upon the department's authority to proceed under Article XX, Section 22, of the Constitution."

Statement of the Case.

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of California. Petitioner applied for an on-sale beer license for the subject premises from the Department of Alcoholic Beverage Control and was granted a license on March 11, 1966. On May 6, 1966, the Department of Alcoholic Beverage Control issued an accusation against Petitioner alleging that Petitioner's employment of "topless" waitresses was conduct contrary to public

welfare and morals and thus violative of Article XX, Section 22 of the California Constitution and Section 24200(a) of the California Business and Professions Code. Upon a hearing before a Hearing Officer the Officer issued a decision in favor of Petitioner, stating that no cause of action existed against Petitioner and thus dismissed the accusation. The Department, under its authority granted by California Government Code Section 11517 refused to accept the Hearing Officer's decision and issued a decision finding that Petitioner's employment of "topless" waitresses was contrary to public welfare and morals and ordered that the license be suspended for 45 days with 15 days stayed under certain conditions. The Department's decision was then appealed to the Alcoholic Beverage Control Appeals Board. The Appeals Board issued a decision upholding the Department. A petition for writ of mandate was then filed in the Los Angeles Superior Court on November 2, 1967, Los Angeles Superior Court Case No. 920 751.

On November 30, 1966, prior to a decision by the Alcoholic Beverage Control Appeals Board on the accusation against Petitioner, the Department of Alcoholic Beverage Control issued another accusation against Petitioner, again alleging that the employment of "topless" waitresses was conduct contrary to public welfare and morals and violative of the California Constitution and California Business and Professions Code. A hearing was held before a Hearing Officer. This

Hearing Officer issued a decision upholding the accusation and ordering Petitioner's license to be suspended for 30 days. The Department of Alcoholic Beverage Control adopted the Hearing Officer's decision. An appeal of the Department's decision was taken to the Alcoholic Beverage Control Appeals Board and the Appeals Board upheld the Department's decision.

On November 8, 1967, amendments to the California Business and Professions Code went into effect which provided that judicial review of the decisions of the Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board would be heard before the California Courts of Appeal or the California Supreme Court, whereas prior to that time, judicial review of such decisions were heard before the Superior Courts of the State. By reason of the statutory amendments, the petition for writ of mandate in the second topless accusation was filed with the California Court of Appeal, Second District. Said petition was filed on December 1, 1967. Therefore, due to the aforementioned statutory amendment, the latter accusation, which is referred to herein as the "second accusation" was placed procedurally ahead of the earlier accusation. It is the second accusation that is the subject for this Petition for Writ of Certiorari.

The petition for writ of mandate before the Court of Appeal was denied on January 2, 1968. A petition for hearing before the California Supreme Court was denied on January 31, 1968.

On February 5, 1968, a hearing on the petition for writ of mandate in the first accusation was held in the Los Angeles Superior Court. The judge found that the Department's finding that the employment of "topless" waitresses is contrary to public welfare and morals was not supported by substantial evidence. The judge thus issued a decision setting aside the Department's decision and remanded the proceeding to the Department for further hearing on the issue of whether or not the employment of topless waitresses is contrary to public welfare and morals.

In both accusations, Petitioner's attorney stipulated with the attorney for the Department of Alcoholic Beverage Control that the facts alleged in the accusations were true, *i.e.*, that Petitioner did, on the dates specified, employ "topless" waitresses. No other evidence was introduced by either party at either hearing. The Department's decisions in the absence of any evidence showing how the conduct was contrary to public welfare and morals held said conduct to be contrary to public welfare and morals as a matter of law. The Los Angeles Superior Court judge held that such a holding was erroneous.

There is a case now before the California Court of Appeal, First District, involving the same issue, *Boreta Enterprises, Inc. dba Off Broadway v. the Department of Alcoholic Beverage Control of the State of California.* In this case, the San Francisco Superior Court judge granted a petition for writ of mandate from a

liquor licensee and set aside the decision of the Department of Alcoholic Beverage Control. The judge held that the employment of "topless" waitresses was not contrary to public welfare and morals and was not grounds for the suspension or revocation of a license.

After receiving the decision of the Los Angeles Superior Court, Petitioner filed a petition for stay order with the California Court of Appeal, Second District, asking that the administrative order of the Department of Alcoholic Beverage Control be stayed until either a decision on the first accusation became final or until the United States Supreme Court had acted upon Petitioner's Writ of Certiorari, whichever occurred later. The Court of Appeal denied the petition on February 27, 1968.

Petitioner duly raised the federal questions presented here at the original hearing [R. T. pp. 1, 2 and 3], before the Alcoholic Beverage Control Appeals Board, and in the California Court of Appeal, and in the California Supreme Court by its pleadings.

On February 28, 1968, petitioner filed an application for stay of administrative decision of the Department of Alcoholic Beverage Control of the State of California with this Court. On March 5, 1968, Associate Justice William O. Douglas of this court issued an order staying the administrative order of the Department of Alcoholic Beverage Control of the State of California pending the timely filing of a petition for Writ of Certiorari and this Court's action on the said petition.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

The Department of Alcoholic Beverage Control of the State of California Has Acted Arbitrarily to Deprive Petitioner of His Right to Operate a Liquor Establishment for Which It Has Been Licensed Without Due Process of Law.

The Department of Alcoholic Beverage Control of the State of California, an administrative agency of the State, has ordered a suspension of Petitioner's on-sale beer license for a period of 30 days without establishing that Petitioner has violated any rule or regulation of the Department or statute of the State of California. In fact, the Department of Alcoholic Beverage Control had not promulgated or established any rules, regulations or standards, nor had the State of California any statute which apprised the Petitioner that the employment of topless waitresses is a violation subject to disciplinary action. Therefore, Petitioner had no set of standards, rules or regulations to apprise it whether or not the employment by it of topless waitresses was in violation of any rule or regulations of the Department of Alcoholic Beverage Control or statute of the State of California.

It must be assumed that the Department of Alcoholic Beverage Control has taken it upon itself to set up a standard *without giving notice of such standard to licensees* that the employment of "topless" waitresses in and of itself is action contrary to public welfare and morals and thus is grounds for suspension or revocation of a license. The standard is arbitrary and unreasonable and is an abuse of the Department's discre-

tionary powers. The Department of Alcoholic Beverage Control clearly does not have the expertise to make this determination; it is a determination that must be made by the courts or by the legislature. There has been no legislative action nor definitive court decision on the issue at the present time. The Department thus has gone beyond the limits of its authority and has abused its discretion in declaring the employment of "topless" waitresses to be contrary to public welfare and morals. By so acting in suspending Petitioner's license, the Department has deprived Petitioner of a valuable property right without due process of law.

Besides the fact that there were no rules, regulations or standards to apprise Petitioner that such conduct would be considered violative of the Statutes of the State of California by the Department of Alcoholic Beverage Control, the Department of Alcoholic Beverage Control produced no evidence whatsoever to show how or in what manner the employment of "topless" waitresses is violative of any statute or regulation, *i.e.*, conduct contrary to public welfare and morals. In the absence of some evidence, the Department of Alcoholic Beverage Control of the State of California cannot suspend Petitioner's license, and to do so is denying Petitioner its right of due process of law.

The Department of Alcoholic Beverage Control has relied upon California Constitution Article XX, Section 22, and California Business and Professions Code, Section 24200 (a) which gives the Department authority to suspend or revoke a license for conduct "contrary to public welfare and morals." Such provisions are vague and uncertain in that the licensee is given no notice of what conduct would be considered to be violative of the

state law; the standard set up by the statute and constitutional section in question is, at best, an ever-varying-changing standard, fluctuating with the changes of moral sentiment.

This Court has on innumerable occasions held a state statute void as violating the due process clause of the Fourteenth Amendment in that the language of the statute was so vague and standardless that it left the public uncertain as to the conduct it prohibited.

See:

Giaccio v. Pennsylvania, 382 U.S. 399;
Baggett v. Bullitt, 377 U.S. 360;
American Communication Association v. Douds, 339 U.S. 382.

This Court has found that photographic nudes as well as nude paintings come within the broad guarantees of the First Amendment.

See:

Sunshine Book Co. v. Summerfield, 355 U.S. 372;
Mounce v. U.S., 355 U.S. 180;
Manual Enterprises, Inc. v. Day, 370 U.S. 478.

This court has also found that "girlie pictures" in coin operated peepshows are not obscene and thus protected under the First Amendment.

See:

Schackman v. California, 87 S. Ct. 2107;
Katner v. California, 87 S. Ct. 2090;
Colbert v. New York, 87 S. Ct. 2092.

This court has also insisted upon strict standards relative to vagueness in the area of free expression and the statutes involved in this case are too vague to be permissible.

See:

Smith v. California, 361 U.S. 147;
Winters v. New York, 333 U.S. 507;
Herndon v. Lowery, 301 U.S. 242;
Cantwell v. Connecticut, 310 U.S. 296.

II.

The Department of Alcoholic Beverage Control of the State of California Is Denying Petitioner Equal Protection Under the Laws by Proceeding With This Suspension When Other Cases in the State of California Have Found the Employment of "Topless" Waitresses Not to Be Contrary to Public Welfare and Morals.

The Department of Alcoholic Beverage Control is acting to suspend the Petitioner's on-sale beer license for 30 days with full knowledge that there has been no definitive final decision by the California Supreme Court on whether or not the employment of "topless" waitresses is action sanctionable by the Department. There have been two court decisions known to Petitioner in the State of California (there may be other court cases decided in favor of licensees) on exactly the same issue as this case that hold that such conduct is not sanctionable, thus permitting licensees to remain open. *Boreta Enterprises, Inc. dba Off Broadway v. the Department of Alcoholic Beverage Control of the State of California,* San Francisco Superior Court Case No. 570 652 (1967); *Probro, Inc. v. Department of Alcoholic Beverage Control of the State of Cali-*

fornia, Los Angeles Superior Court Case No. 920 751 (1968). In fact, one of these cases involves Petitioner itself. Thus there is a disparity of decision throughout the State of California on the this issue. Some court decisions have allowed licensees employing "topless" waitresses to remain open and the other decisions have ordered a license suspended for the employment of "topless" waitresses. Thus at the present time in the State of California, there exists an unequal application of the law by the Department of Alcoholic Beverage Control, a statewide agency, in that some establishments are allowed to remain open while others are closed although all of these establishments were permitting the same conduct. Until there has been a final decision by the highest court in the state, the Department of Alcoholic Beverage Control, by suspending Petitioner's license, is denying Petitioner equal protection under the law.

III.

The Department of Alcoholic Beverage Control of the State of California Has Acted as a Censor in That Itself Alone Has Determined the Employment of "Topless" Waitresses Is Wrong and Is Grounds for Penalty.

The Department of Alcoholic Beverage Control is alone determining whether the actions of Petitioner are to be sanctioned without any standards or rules or regulations set forth by which to independently judge whether the conduct of Petitioner is in fact violative of any statutes. The Department of Alcoholic Beverage Control is clearly prescribing semi-nudity as wrong in and of itself. While the Department's power is to regulate the sale of alcoholic beverages, neither the Twenty-First Amendment to the United States Con-

stitution nor the constitutional laws of the State of California empower the Department to act as a censor or to constitute it to be a critic of art; nor is there basis for the Department expanding its authority to regulate the attire of waitresses without any showing of a "wrong" or "evil" to be cured.

What the Department of Alcoholic Beverage Control has done amounts to prior restraint. It alone has seen fit to determine that the employment of "topless" waitresses is wrong and is grounds for suspension or revocation of a liquor license.

This court has declared prior restraints to be unconstitutional.

See:

Freedman v. Maryland, 380 U.S. 51;

Superior Films, Inc. v. Department of Education, 346 U.S. 587.

Conclusion.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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